

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: NORTHERN NATURAL GAS COMPANY AND PEOPLES NATURAL GAS COMPANY, DIVISION OF UTILICORP UNITED INC. n/k/a AQUILA, INC., d/b/a AQUILA NETWORKS	DOCKET NO. INU-02-1
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ORDER DENYING APPLICATION FOR STAY

(Issued July 12, 2002)

On March 5, 2002, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed an application with the Utilities Board (Board) requesting that the Board commence an investigation into the retention of ad valorem tax refunds by Northern Natural Gas Company (NNG or Northern) and Peoples Natural Gas Company, Division of UtiliCorp United Inc., n/k/a Aquila, Inc., d/b/a Aquila Networks (Peoples or Aquila). Consumer Advocate stated that it had information Northern received a refund of ad valorem taxes of approximately \$3.15 million from producers for the period 1983 to 1989 that it had not returned to retail customers. The Iowa portion of the ad valorem tax refund is approximately \$825,000. Consumer Advocate stated that although Northern received the refund amount from the producers, Northern refused to make refunds or pass the funds to Aquila for distribution to the retail customers.

On March 11, 2002, the Board issued an order pursuant to the provisions of Iowa Code § 476.10 (2001). In the order the Board stated it was necessary to investigate any retention of ad valorem tax refunds by Northern or Aquila. The Board cited the decision from the United States Court of Appeals for the District of Columbia Circuit that held producers must refund certain Kansas ad valorem taxes that were collected in excess of the maximum lawful prices for first sales of natural gas under Title I of the Natural Gas Policy Act (NGPA) for the period 1983 through 1988. Public Service Company of Colorado v. Federal Energy Regulatory Commission, 91 F.3d at 1478 (D.C. Cir. 1996). The Board also cited the order of the Federal Energy Regulatory Commission (FERC) issued September 10, 1997, establishing procedures for the refunding of the ad valorem taxes by the producers to the interstate pipelines. Public Service Co., et al., 80 FERC ¶ 61,264 (1997), reh'g denied, 82 FERC ¶ 61,058. The Board requested the parties respond to certain inquiries to obtain additional information concerning the retention of the ad valorem tax refunds.

After consideration of the responses to the Board's inquiries, the Board issued an order on May 10, 2002, directing Northern to refund the Kansas ad valorem tax overcharges to Aquila, and directing Aquila to refund the overcharges to its customers using the same procedures as previous Kansas ad valorem tax refunds. On June 7, 2002, Northern filed an application for stay of the Board's order. Northern has also filed for judicial review in the Polk County District Court and for a Declaratory Ruling at the Federal Energy Regulatory Commission (FERC). On

June 21, 2002, Consumer Advocate filed a resistance to the application for stay. On July 8, 2002, Northern filed a response to Consumer Advocate's resistance.

Iowa Code § 17A.19(5)"c" states in pertinent part that a stay may be granted by a court only after consideration and balancing of all of the following factors:

(1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.

(2) The extent to which the applicant will suffer irreparable injury if relief is not granted.

(3) The extent to which the grant of the relief to the applicant will substantially harm other parties to the proceedings.

(4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

NORTHERN'S POSITION

Northern contends that a stay should be granted by the Board to preserve the status quo during the pendency of the appeal of the Board's order. Northern asserts that its filing for a Declaratory Order at FERC supports the issuance of a stay and that FERC's ruling on Northern's request is of "utmost importance" to the issues presented by Northern in its petition for judicial review. Northern asserts that the stay will not harm any party since the refunds will continue to draw interest during the stay.

Northern asserts that it is likely to succeed in the judicial review proceeding. Northern contends that it is not and never has been subject to the Board's regulatory

jurisdiction and that it was Peoples Natural Gas Company, a division of InterNorth, Inc. (InterNorth), during the relevant period, that filed reports, that sought approval of tariffs and rate changes, and to which orders issued by the Board were directed. Northern contends that it is not a public utility subject to the Board's jurisdiction.

Northern then argues that even if the court found that the Board had jurisdiction over Northern, the court would not affirm the Board's conclusion that Northern had violated FERC orders by retaining the Kansas ad valorem tax refunds. Northern contends that the Board's conclusion that FERC directed Northern to make refunds to customers whether FERC-jurisdictional or non-FERC-jurisdictional has no foundation in FERC orders and so is unlikely to be upheld by Iowa courts.

Northern also asserts that the stay will not substantially harm the other parties to this proceeding and the requirement of interest on the refunds protects the interests of the customers. Northern contends that it will suffer great and irreparable harm in the event that the Board's order is ultimately overturned by an Iowa court, since it will be unduly burdensome and costly to recoup the funds once they are paid to Aquila.

Northern contends further that the public interest weighs in favor of the stay since maintaining the status quo will prevent any harm from coming to any of the parties. Northern argues that the public interest does not favor Northern being required to make the refund and then, if successful on appeal, to be required to attempt to recover the refunds from customers.

In its reply to Consumer Advocate's resistance, Northern advances several new arguments. First, Northern argues that it has a financial interest in the proceeding, based upon the purchase agreement with Aquila, and that the refunds appropriately remain with Northern. Second, maintenance of the status quo is crucial to protect Northern's contractual rights and it would be extremely difficult for Northern to recoup the refunds from Aquila if successful on judicial review. Third, that the FERC declaratory ruling will decide the intent of the FERC orders once and for all. Fourth, that Northern has never been subject to the Board's jurisdiction. Fifth, the refunds should come from Aquila rather than Northern. Finally, the public interest demands that the status quo be maintained pending the judicial review so that the appeal is not rendered moot.

CONSUMER ADVOCATE'S POSITION

Consumer Advocate takes the position that retention of the refunds is completely at odds with the decision of the United States Court of Appeals for the D.C. Circuit. Public Service Co. of Colorado, 91 F.3d at 1478. That decision, Consumer Advocate contends, requires Northern to flow through any ad valorem tax refunds received from producers to the customers who actually paid the unlawful overcharge. Consumer Advocate points out that FERC characterized the interstate pipelines, such as Northern, as "mere conduits" with "no financial interest" in the dispute in the FERC brief at the Court of Appeals. Id. at 1491-92.

Consumer Advocate points out that the interstate pipelines were not held to be guarantors for the refunding of the overcharges since they were "mere conduits" and

the decisions of the Court of Appeals and FERC clearly contemplate that the refunds will be flowed through to the ultimate customers. Consumer Advocate argues that the public interest is not served by maintaining the status quo, since the public interest is in the refunding of the overcharges to customers as directed by the Court of Appeals.

Consumer Advocate cites Teleconnect Company v. Iowa State Commerce Commission, 366 N.W.2d 511 (Iowa 1985), to support this position. The Iowa Supreme Court held in the Teleconnect case that in litigation involving the administration of regulatory statutes designed to promote the public interest, the public interest is the crucial factor, and the interest of private litigants must give way to the fulfillment of public purposes. Teleconnect, 366 N.W.2d at 513.

Consumer Advocate then asserts that Northern cannot be harmed by refunding the Kansas ad valorem tax overcharges since it has no financial interest in the refunds. Additionally, if Northern has a contract action against Aquila for disposition of the proceeds, that matter is independent and unaffected by the Board's order. Consumer Advocate then states that the disposition of the refunds need not wait for a FERC ruling concerning its authority over the refunds.

Consumer Advocate concludes that Northern is not likely to prevail on the merits since the Board was correct in finding that the sale of natural gas at retail during the relevant period was by InterNorth, and Northern as the successor of InterNorth is subject to the Board's jurisdiction for purposes of refunds associated with those sales.

BOARD'S DECISION

The Board finds that the stay should be denied. The Board ordered the refunds to complete the process ordered by the United States Court of Appeals for the D.C. Circuit and established by FERC. Public Service Co. of Colorado, 91 F.3d at 1478; 80 FERC ¶ 61,264. This process will be completed when Northern flows through the overcharges associated with Kansas's ad valorem taxes paid between October 4, 1983, and December 20, 1985, to Iowa customers who were required to pay the taxes.

The Court of Appeals began the process of remedying the violation of the NGPA by ordering the refunds be returned to the ultimate customer. The Court of Appeals adopted the FERC procedures of having the refunds paid by producers to interstate pipelines as "mere conduits" to flow the refunds back to the ultimate customer. The Board has attempted to complete this remedy by requiring the refunds be passed through Aquila to be refunded to Iowa retail customers of Aquila.

The Board has the discretion to grant a stay or to deny an application for a stay. Iowa courts consider the four criteria in Iowa Code § 17A.19(5)"c" in determining whether to stay agency action; the Board will consider the same four factors, guided by judicial interpretation.

The primary case concerning the Board's discretion and the balancing of the interests under this statute is from an appeal of the Board's predecessor, the Iowa State Commerce Commission (ISCC). Teleconnect, 366 N.W.2d at 512. That appeal was of an ISCC rule making establishing access charges to be paid to local

exchange carriers by providers and resellers of long distance service. The Iowa Supreme Court held that the issuance of a stay by the Board was discretionary and reversed the District Court grant of a stay.

The Iowa Supreme Court in the Teleconnect case held that the evidence came down strongly against issuing a stay under the requirements of criteria 3 and 4, even though the Court had insufficient evidence to consider criteria 1 and 2. The court found that the only stake that Teleconnect had was the loss of revenue and that such a loss, even if substantial, did not amount to irreparable harm. Teleconnect, 366 N.W.2d at 514. The Court then held that there would be no public harm in denying the stay and that in litigation involving the administration of regulatory statutes designed to promote the public interest, the public interest is the crucial factor, and the interest of private litigants must give way to the fulfillment of public purposes. Teleconnect, 366 N.W.2d at 513.

In another case, the Iowa Court of Appeals held that loss of earnings, even if substantial, was not sufficient harm to justify imposition of a stay, citing the Teleconnect case. R&V, Ltd., v. Iowa Department of Commerce, Alcoholic Beverages Division, 470 N.W.2d 59, 62 (Iowa Ct. App. 1991). The Court found that the potential for closing a business forever was sufficient harm to warrant a stay of administrative action. There are no allegations that the refund will force Northern out of business.

The Board will next consider the application for stay using the four criteria established for consideration of a stay in Iowa Code § 17A.19(5)"c."

1. The extent to which the applicant is likely to prevail when the court finally disposes of the matter.

Based upon consideration of the facts and law in this docket, the Board concludes that Northern will not prevail on the merits of this matter. Northern is attempting to retain refunds received from producers for Kansas ad valorem tax overcharges of the price for natural gas. The inclusion of the Kansas ad valorem tax was found to be a violation of the Natural Gas Policy Act. The overcharges for the taxes were ordered to be refunded to the ultimate customer, here Iowa retail customers of Aquila. Northern received the refunds as a "mere conduit" for purposes of flowing the refunds back and, as found by the U.S. Court of Appeals, has no financial interest in the refunds. Public Service Co. of Colorado, 91 F.3d at 1492.

The Board has jurisdiction over the refunds pursuant to Iowa Code chapter 476 regarding the rates and operations of InterNorth during the relevant period. InterNorth was the regulated entity under Board jurisdiction during the relevant period, and Northern was a division of InterNorth as was Peoples Natural Gas Company. The transfers of natural gas between Northern and Peoples Natural Gas Company were within a regulated utility and the retail sales to Iowa customers by InterNorth were within the Board's jurisdiction. Northern as the successor to InterNorth, for purposes of flowing through the refunds, is now within the Board's jurisdiction since it has retained the refunds.

2. The extent to which the applicant will suffer irreparable injury if relief is not granted.

Regardless of the protestations of Northern, Northern will not suffer irreparable harm from making the refunds as ordered. Northern does not have a financial interest in the refunds and was given the refunds as a conduit for returning them to Iowa customers. Northern's contractual dispute with Aquila is a private cause of action that is not relevant to Northern's responsibility to refund the overcharges to Iowa customers. Northern cannot be hurt by making the refunds as directed since it is involved in litigation concerning the contract with Aquila in a Nebraska court and, if successful, it will be reimbursed by Aquila. Regardless of Northern assertions, the recovery of the refund money is neither "impossible" nor "extremely difficult," if a court determines that Northern should be reimbursed. The contract dispute between Northern and Aquila should not be allowed to interfere with the return of the overcharges to customers who paid them.

Additionally, Northern's position concerning irreparable harm is even less persuasive than that addressed by the Iowa Supreme Court in the Teleconnect case. The Iowa Supreme Court held "Teleconnect's only stake was a loss of revenue. Such a loss, even if substantial, does not amount to irreparable damage." Teleconnect, 366 N.W.2d at 514. Northern is not even trying to prevent the loss of revenue but only to retain refunds that belong to Iowa retail customers.

3. The extent to which the grant of the relief to the applicant will substantially harm other parties to the proceedings.

No other parties to the proceeding will be harmed by refunding the Kansas ad valorem tax overcharges as required by the Court of Appeals, FERC, and the Board. Iowa customers may be harmed by a denial of the use of the refunds. Northern argues that it will be harmed and put to great expense if a court ultimately reverses the Board. This argument is not supported by the facts. Northern is engaged in litigation now concerning the purchase contract and any additional cost to be reimbursed by Aquila should be minimal.

4. The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

The public interest favors the completion of the remedy ordered by the U.S. Court of Appeals of the violation of the NGPA and the return of the overcharges to Iowa retail customers. The Court of Appeals ordered the return of the Kansas ad valorem tax overcharges to Iowa customers as the remedy of the statutory violation. The producers have completed their part of the process and have paid the refunds to Northern. Northern must now perform its part of the process and flow the refunds through to Aquila for ultimate refund to Iowa customers. Any delay in returning the refunds to the customer is against the public interest and only benefits the private interest of Northern. Maintaining the status quo only prolongs the artifice constructed by Northern that it has some legitimate claim to the refunds.

The Board therefore concludes that Northern has failed to satisfy any of the four criteria in Iowa Code § 17A.19(5)"c" for granting a stay and the Board will deny the application for stay filed by Northern on June 7, 2002.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The application for a stay of the May 10, 2002, order filed by Northern Natural Gas Company on June 7, 2002, is denied.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 12th day of July, 2002.